Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor

HIGH COURT (PENANG) – CIVIL SUIT NO 22-36-88
WAN ADNAN J
12 NOVEMBER 1988

Banking – Performance guarantees – Obligation to honour performance guarantees unless fraud committed by beneficiary of guarantee – Fraud must be on performance guarantees and not on any other document

Civil Procedure – Injunction to restrain defendant bank from making payment under performance guarantee – Application for consent order entered between plaintiff and defendant bank – Plaintiff alleged fraud committed on consent order by defendant bank – Whether fraud was on performance guarantee – Whether there exists serious question to be tried – Where balance of convenience lay

The plaintiffs entered into three agreements with N for the purchase of crude palm oil. The plaintiffs agreed to provide a guarantee in the name of the first defendant for the due performance of the plaintiffs' obligation under the agreement. Three bank guarantees were given by the second defendant bank and in return, the plaintiffs gave letters of indemnity to the second defendant. The beneficiary under each guarantee was the first defendant. Subsequently, a dispute arose and the plaintiffs commenced a civil suit against N as the first defendant and the first defendant in the present suit as the second defendant. The parties compromised and a consent order was recorded.

The plaintiffs then applied to the court for, inter alia, a declaration that the plaintiffs were relieved from performing any of its obligations under the consent order and an injunction restraining the second defendant from making payment to the first defendant under the bank guarantees.

By a notice of motion, the plaintiffs applied to the court for an injunction restraining the second defendant from making payment of the sum of $500,000 under guarantees 87/0425 and 87/0426 and to restrain the first defendant from receiving the same. The main basis of the plaintiffs' claim was that fraud was committed by the first defendant in respect of the consent order.

Held, dismissing the application:

(1) The guarantees in this case are performance guarantees and the second defendant is obliged to honour them unless it has notice of clear fraud committed by the first defendant. The fraud must be on the performance guarantee itself and not on any other document. However, the plaintiffs make no such allegation and there is no evidence that the claim is fraudulent.

(2) The consent order was a compromise after the dispute between the parties had gone to court and both parties, with the assistance of their solicitors, would have been very careful not to leave any matter open to any further dispute between them. After considering all the facts, the court finds that there is no serious question to be tried. Even if there is a serious question to be tried, the balance of convenience lies in the defendants' favour as the plaintiffs will be adequately compensated by damages for the loss sustained if it succeeded in the action.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 425 of 1988.]

Cases referred to

1 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 (folld)
2 *Fellowes & Son* v *Fisher* [1976] QB 122 (refd)
3 *Edward Owen Engineering Ltd* v *Barclays Bank International Ltd* [1978] QB 159 (folld)
4 *United Trading Corporation SA & Murray Clayton Ltd* v *Allied Arab Bank Ltd & Ors* [1985] 2 Lloyd's Rep 554 (folld)

G Sri Ram (*K Kumarendran* with him) for the plaintiffs.
S Kanawagi for the defendants.

Cur Adv Vult

Wan Adnan J: In this action the plaintiffs claim for the following orders:

(a) a declaration that the plaintiffs are relieved from performing any of their obligations under the consent order dated 21 January 1988;
(b) a declaration that the first defendant is not entitled to enforce the guarantees nos 87/0425 and 87/0426 both dated 23 July 1987 and issued by the second defendant in the first defendant's favour;
(c) rescission of the agreement embodied in the said consent order;
(d) an order that the said consent order be set aside;
(e) an injunction perpetually restraining the first defendant from enforcing or attempting to enforce the said bank guarantees or from receiving payment from the second defendant upon the said bank guarantees;
(f) a declaration that the second defendant is not entitled to make payment of the sum of M$500,000 or any sum whatsoever to the first defendant upon the said bank guarantees;
(g) an injunction perpetually restraining the second defendant from making payment to the first defendant under the said bank guarantees;
(h) general damages for fraud;
(i) interest on damages;
(j) costs;
(k) further or other relief.

By the notice of motion (encl 2) the plaintiffs had applied for the following orders:

(a) the second defendant, whether by itself or its agents or servants or howsoever otherwise be restrained and an injunction be granted restraining it from making payment of the sum of M$500,000 or any sum whatsoever under the guarantees issued by it on 23 July 1987 and numbered 87/0425 and 87/0426 respectively;
(b) the first defendant, whether by itself or its agents or servants or howsoever otherwise be restrained and an injunction be granted restraining it from receiving payment of the sum of M$500,000 or any sum whatsoever under the second defendant's guarantees dated 23 July 1987 and numbered 87/0425 and 87/0426 respectively;

until after the trial of this action.

The motion was heard ex parte and I granted the orders in terms of the motion till the date fixed for the hearing of the motion inter partes. After hearing both parties I dismissed the application and set aside the ex parte order. The plaintiffs now appeal.

The background of the case is as follows:

(1) On 30 August 1987 the plaintiffs entered into three agreements with National Rubber Smallholders Cooperative Bhd ('NARSCO') for the purchase of crude palm oil. Under each agreement the plaintiffs had agreed to provide a security deposit in the sum of M$250,000 in the form of a bank guarantee in the name of Estet Pekebun Kecil Sdn Bhd ('the first defendant') for the due performance of the plaintiffs' obligations under the agreement.
(2) Three bank guarantees were given by Malayan Banking Bhd ('the second defendant'). They were guarantees nos 87/0538, 87/0425 and 87/0426. The beneficiary under each guarantee was the first defendant.
(3) A dispute arose. The plaintiffs then commenced a civil suit in Penang High Court vide Suit No 22-145-87. In that suit NARSCO was named as the first defendant and the first defendant in the present suit was named the second defendant.
(4) Subsequently the parties compromised and a consent order was recorded on 21 January 1988.

The principles in *American Cyanamid Co* v *Ethicon Ltd*[1] were set out by Sir John Pennycuick in *Fellowes & Son* v *Fisher*[2] as follows:

> (1) provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a prima facie case;
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> (2) the court must consider whether the balance of convenience lies in favour of granting or refusing interlocutory relief;
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> (3) 'as to that' the court should first consider whether, if the plaintiff succeeds, he would be adequately compensated by damages for the loss sustained between the application and the trial, in which case no interlocutory injunction should normally be granted;
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> (4) if damages would not provide an adequate remedy the court should then consider whether if the plaintiff fails the defendant would be adequately compensated under the plaintiff's undertaking in damages, in which case there would be no reason upon this ground to refuse an interlocutory injunction;
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> (5) then one goes on to consider all other matters relevant to the balance of convenience, an important factor in the balance should this otherwise be even, being preservation of the status quo. By the expression 'status quo' I understand to be meant the position prevailing when the defendant embarked upon the activity sought to be restrained. Different considerations might apply if the plaintiff delays unduly his application for relief;
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> (6) finally, and apparently only when the balance still appears even, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence.

The plaintiffs' application is supported by the two affidavits of Jugal Kishor Shivlal affirmed on 26 March 1988 (encl 3) and 14 August 1988 (encl 9). He is the manager of the trading department of the plaintiffs. He and Hemant Patel were present during the negotiations with the officers of the first defendant Chan Yew Cheong and Abdul Rahman Ismail whom he alleged had orally represented that any request for an extension of time by the plaintiff to perform any of the obligations would be considered favourably by the first defendant. He affirmed that but for that representation neither he nor Hemant Patel would have agreed to the terms which were eventually embodied in the consent order. Both of them were induced to believe and did believe that the first defendant would not insist on time being of the essence despite an agreement by all parties that such a term be included in the consent order. The particulars of representation and fraud were set out in the statement of claim.

The first defendant's case is supported by the affidavits of Abdul Rahman bin Ismail (encl 6), Mokhtar bin Haji Ngah (encl 7) and Chan Yew Cheong (encl 8). All deny the allegations in the plaintiffs' affidavits. The second defendants did not take part in the proceedings.

The injunction sought is to restrain the second defendant from making payment of the sum of M$500,000 under the guarantees numbered 87/0425 and 87/0426 and to restrain the first defendant from receiving the same.

The second defendant had issued the guarantees to the first defendant upon request made by the plaintiffs. In order to procure the guarantees the plaintiffs gave letters of indemnities to the second defendant.

The letter of guarantee reads:

> In consideration of ... we hereby guarantee you the sum of $250,000 (ringgit: two hundred and fifty thousand only) being security deposit required under the said contract and shall become payable by us on request by you without your having to assign any cause for any request.

In the letter of indemnity given by the plaintiffs to the second defendant, the plaintiffs:

> hereby agree and irrevocably authorize you to pay to the guaranteed party the sum guaranteed upon demand by the guaranteed party and we shall at all times hereafter unconditionally indemnify and keep you indemnified ...

The guarantees are in fact performance bonds.

In *Edward Owen Engineering Ltd* v *Barclays Bank International Ltd*,[3] Lord Denning MR stated the law as to performance bonds as follows:

> A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit...
>
> All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the bank has notice.

In *United Trading Corporation SA & Murray Clayton Ltd* v *Allied Arab Bank Ltd & Ors*[1] Lord Justice Ackner said:

> *Edward Owen Engineering* [1978] 1 Lloyd's Rep 166; [1978] 1 QB 159, is of course the locus classicus for the proposition that a performance bond, standing on a similar footing to a letter of credit, obliges a bank to honour it according to its terms, unless it has notice of clear fraud committed by the beneficiary.

The guarantees in this case are performance guarantees. Therefore the above principles apply. Hence the second defendant is obliged to honour them unless it has notice of clear fraud committed by the first defendant.

The plaintiffs are alleging fraud committed by the first defendant in respect of the consent order. In order to prevent the second defendant from honouring its obligations the fraud must be on the performance guarantee itself and not on any other document. The claim on the performance guarantee by the first defendant must be fraudulent. The plaintiffs make no such allegation and there is no evidence that the claim is fraudulent. I therefore find that there is no question to be tried. The plaintiffs are not entitled to the injunction.

In case I am wrong in coming to the above conclusion I will proceed to consider whether the allegation of fraud by the plaintiffs gives rise to any serious question to be tried.

The facts leading to the recording of the consent order are clearly set out in the affidavit of Chan Yew Cheong. The parties started negotiations on 28 December 1987. At all times both parties were represented by solicitors. Between 30 December 1987 and 21 January 1988 (the date of the consent order) four different drafts were exchanged. Clause 1(c)(ii) in the consent order which reads:

> The plaintiffs shall make the above stated payments to the defendants within the time stipulated or failing which the plaintiffs shall be deemed to have defaulted.

was not in the first draft or the second draft. In the first draft the following paragraph was included:

> In the event of any default by the plaintiffs of any one of the instalment payments, the plaintiffs shall pay an interest at the rate of 10% pa on the balance amount due.

The same paragraph appears in the second draft as cl A(4). On this draft there are markings indicating cancellation. In the third and fourth drafts this clause was replaced by cl 1(c)(ii) which reads:

> The plaintiffs shall make the above stated payments to the defendants within the time stipulated or failing which the plaintiffs shall be deemed to have defaulted.

which was the clause that was embodied in the consent order. In the third and final draft new clauses were included to make provisions in the event of default.

All these clearly show that the parties had given particular attention to time being of the essence and had so agreed. If it was true that the officers of the first defendant had said that any request for extension of time by the plaintiffs would be favourably considered the plaintiffs would have insisted on and a suitable clause would have been included in the consent order. It must be remembered that the consent order was a compromise after the disputes between the parties had gone to court and both parties with the assistance of their solicitors would have been very careful not to leave any matter open to any further dispute between them.

The conduct of the parties after the execution of the consent order is also relevant to determine the probability of the plaintiffs' allegation of fraud and misrepresentation. By a letter dated 13 February 1988 the plaintiffs informed NARSCO that they had truly fulfilled their part of cl 1(c)(ii) of the consent order. The first defendant had been reminding the plaintiffs by telex about their obligation under the consent order. There was no reply from the plaintiffs until the 'without prejudice' telex of 14 March 1988 requesting for extension. Counsel for the first defendant submitted that this telex was not admissible. I found that although it was written 'without prejudice' it was not inadmissible. There were no negotiations or attempted negotiations between the parties at that time. It was just a request for extension of time.

The telex was sent at 11.50 am on 14 March 1988. Reply was given only on 16 March 1988. Counsel for the plaintiffs submitted that the delay was not explained. He said that if there had been no representation as alleged there should have been no delay and therefore there was a serious question to be tried. I do not agree with this suggestion. This fact should not be considered independently. It must be considered in the light of the other facts which I had stated above.

After considering all the facts I find that there is no serious question to be tried.

I will also consider the balance of convenience in the event that I am held to be wrong in finding that there is no serious question to be tried.

In this case I find that if the plaintiffs succeed in the action they will be adequately compensated by damages for the loss sustained. The two defendants or either of them will be able to comply with any order as to damages.

I therefore dismiss the application with costs.

Application dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar*; *Khana & Co.*

Reported by *Ng Sheau Jiuan*

Seok Mee Seong v Abdul Wahab bin Abdul Rahman

HIGH COURT (SEREMBAN) – CIVIL REVISION NO 13-10 OF 1988
MUSTAPHA HUSSAIN J
19 SEPTEMBER 1988

Civil Procedure – Default judgment – Setting aside of – Claim for cost of repairs to damaged car – Whether they were within meaning of 'debt or liquidated damages' – Final judgment given by magistrate and not interlocutory – Whether judgment irregular

Civil Procedure – Absence of defendant on day of hearing – Whether explanation as to absence the deciding factor in setting aside default judgment – Whether defence on the merits and triable issues disclosed the more crucial factor

The respondent's car was involved in a road accident with the applicant's car. The respondent's car was subsequently repaired and he filed a claim in the Magistrate's Court. The applicant's solicitors were advised to file a defence but on the day of the hearing, the applicant and his solicitor were absent and there was no defence filed. The learned magistrate therefore gave judgment in default of defence against the applicant. The applicant then applied to the court to set aside the judgment in default and for leave to enter appearance and to defend the case. The learned magistrate, after hearing the application to set aside the judgment, dismissed it and awarded costs to the respondent. The applicant then applied to the High Court for a revision order, contending that (i) the default judgment was irregular as the respondent's claim was not a debt or a liquidated sum. As such, the default judgment should be interlocutory and not final; (ii) even if the judgment was regular, there was a defence on the merits.

Held, allowing the application:

(1) The words 'debt or liquidated demand' do not extend to unliquidated damages even if that amount of damages is a definite figure. In this case, even though the plaintiff's claim for cost of repairs to the damaged car have been quantified and a definite figure given, it does not come within the meaning of 'debt or liquidated damages'.

(2) In an application to set aside a judgment in default, the explanation as to why the defendant or his counsel was absent is relevant but not the deciding factor. What is important or crucial is whether there is a defence on the merits. The draft defence enclosed with the application disclosed triable issues and the learned magistrate should have allowed the application to set aside and leave given to the applicant to defend the action subject to the applicant paying costs.

Cases referred to

1 *Mahindar Singh* v *Amanah Saham Pahang Bhd & Anor* [1984] 1 CLJ 181 (folld)
2 *Knight* v *Abbott* (1882) 10 QBD 11 (folld)
3 *Seng Huat Hang Sdn Bhd* v *Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 (folld)
4 *Evans* v *Bartlam* [1937] AC 473 (refd)

VT Singam for the applicant.
Respondent in person.

Cur Adv Vult

Mustapha Hussain J: The respondent is the owner of car No WG 2957 which was involved in a road accident with the applicant's Mercedes car No CA 2497 at about 3.20 pm on 26 May 1987 near the Balai Bomba in Rembau. According to the respondent's police report (No 1038/87, Balai Polis Pedas) the applicant's car knocked into his car from the back.

The applicant too made a report (No 1039/87, Balai Polis Pedas) saying that the respondent driving in front of him suddenly applied brakes and the applicant had no time to stop his car as at that time he was cleaning the windscreen. It was raining at that time.

A letter dated 28 September 1987 from the OCPD Tampin confirmed that the applicant was summoned under r 10 of LN 166 of 1959 and was compound fined $75.

The respondent obtained an estimate of repairs to repair his damaged car from RT Lingam Insuran Adjusters (M) Sdn Bhd who estimated the cost of repairs of the car at $1,727.71 and the adjuster's bill amounted to $142.50 (a breakdown of the damages and estimated cost of repairs together with the adjuster's bill can be found in the adjuster's report dated 20 August 1987, annexed to the respondent's affidavit dated 21 March 1988 (encl 20)). The respondent's car was subsequently repaired at a cost of $2,471.20 (see invoice issued by Syarikat Wee Seng Motor, also annexed to affidavit encl 20).

On 2 September 1987 the respondent filed a Small Claim Court Summons No 06-1-87 in Second Class Magistrate's Court, Rembau. His claim was: